

GOVERNMENT PROPOSED JURY INST. NO. 226

Failure to Deposit Withholding Taxes -- Offense Charged

The [*information or indictment*] sets forth _____ counts or charges.

It is charged in the [*information or indictment*] as follows:

1. That during the period _____, 19__, to _____, 19__, in the _____ District of _____, the defendant, _____, was an employer of labor required under the provisions of the Internal Revenue Code to collect, account for, and pay over to the United States federal income taxes and Federal Insurance Contributions Act (F.I.C.A.) taxes withheld from wages.

2. That the defendant did fail at the time and in the manner prescribed by the Internal Revenue Code, and Regulations promulgated pursuant thereto, to collect, truthfully account for, and pay over and to make deposits and payments of the said withheld taxes to the United States, which were due and owing for the quarters ending _____, 19__, _____, 19__, _____, 19__, and _____, 19__.

3. That on _____, 19__, the defendant was notified of such failure by notice delivered in hand to him [her] as provided by Title 26, United States Code, Section 7512, which notice advised him [her] that he [she] was required to collect the aforesaid taxes that became collectible after the delivery of such notice, and, not later than at the end of the second banking day after such collection, to deposit said taxes in a separate bank account established by him [her] in trust for the United States to be kept therein until paid over to the United States.

4. That within the _____ District of _____, the defendant unlawfully failed to comply with the provisions of Title 26, United States Code, Section 7512, in that, after receiving delivery of the notice referred to in paragraph 3, he [she] paid wages and was required to collect and deposit the said taxes, but failed to deposit said taxes in a separate bank account in trust for the United States, by the dates and in the amounts hereinafter specified:

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26 U.S.C. § 7215(7512)

<u>COUNT</u>	<u>DATE WAGES PAID</u>	<u>DATE DEPOSIT REQUIRED</u>	<u>AMOUNT OF DEPOSIT REQUIRED</u>
I.	_____	_____	_____
II.	_____	_____	_____
III.	_____	_____	_____
IV.	_____	_____	_____

All in violation of Title 26, United States Code, Section 7215.

26 U.S.C. § 7215

GOVERNMENT PROPOSED JURY INST. NO. 228Statutes Defining Offense

The [*information or indictment*] charges a failure to comply with the requirements of Section 7512(b) of the Internal Revenue Code, which are as follows:

Any person who is required to collect, account for, and pay over any [*withholding taxes*], * * * if notice has been delivered to such person [*for failure to comply*], * * * shall collect the [*withholding*] taxes * * * which became collectible after delivery of such notice **1**, shall (not later than the end of the second banking day after any amount of such taxes is collected) deposit such amount in a separate account in a bank * * *, and shall keep the amount of such taxes in such account until payment over to the United States. Any such account shall be designated as a special fund in trust for the United States, payable to the United States by such person as trustee.

26 U.S.C. § 7512(b)

Section 7512 of the Internal Revenue Code provides, in part, as follows:

(a) **Penalty.** -- Any person who fails to comply with any provision of section 7512(b) shall * * * be guilty [*of an offense against the laws of the United States*].

(b) **Exceptions.** -- This section shall not apply --

(1) to any person, if such person shows that there was reasonable doubt as to (A) whether the law required collection of tax, or (B) who was required by law to collect tax, and

(2) to any person, if such person shows that the failure to comply with the provisions of section 7512(b) was due to circumstances beyond his control.

For purposes of paragraph (2), a lack of funds existing immediately after the payment of wages (whether or not created by the payment of such wages) shall not be considered to be circumstances beyond the control of a person.

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26 U.S.C. § 7215(7512)

26 U.S.C. § 7215

NOTE

1 Section 7512(a) provides that, in the case of a corporation, partnership, or trust, notice delivered in hand to an officer, partner, or trustee shall, for purposes of this section, be deemed to be notice delivered in hand to such corporation, partnership, or trust and to all officers, partners, trustees, and employees thereof.

GOVERNMENT PROPOSED JURY INST. NO. 230Essential Elements of Offense

The essential elements of the offense charged in Count ____ of the information, each of which must be proved beyond a reasonable doubt, are as follows:

First, that during the period from _____, 19__, to _____, 19__, the defendant, _____, was an employer of labor and, as such, was required to collect, account for, and pay over to the United States federal income and F.I.C.A. taxes withheld from the wages of his [her] employees;

[First, that during the period from _____, 19__, to _____, 19__, the defendant, _____, was a person in such a relationship to the corporation that he [she] was a person required to collect, account for, and pay over the federal income and F.I.C.A. taxes withheld from the wages of the employees of _____;]

Second, that prior to _____, 19__, the defendant failed to collect, truthfully account for, or pay over such taxes, or failed to make deposits, payments, or returns of such taxes at the time and in the manner prescribed by law or regulations;

Third, that on _____, 19__, the defendant was notified by a notice delivered in hand of the failure to do so;

Fourth, that said notice directed the defendant to establish a separate bank account in trust for the United States, to deposit such taxes in the separate bank account not later than two banking days after the taxes were collected or withheld, and to keep such taxes deposited in the bank account until payment to the United States; and

Fifth, that on _____, 19__, two banking days after the collection of the taxes, the defendant failed to deposit the amount of \$_____ in federal income and F.I.C.A. taxes collected from the wages of his [her] employees in a separate bank account in trust for the United States.

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26 U.S.C. § 7215(7512)

Now, the essential elements of Counts ___, ___, and ___ of the information [*indictment*] are the same as in Count ___, except they differ as to the date of the alleged failure to make the bank deposit and the amount of the taxes withheld from [*indictment*] the employee's wages. The date and amount as to each count appear in the information, which you will take with you to the jury room, and the court will not repeat them at this time.

United States v. Hemphill, 544 F.2d 341, 343-344 (8th Cir. 1976), *cert. denied*, 430 U.S. 967 (1977)

United States v. Erne, 576 F.2d 212, 213 (9th Cir. 1978)

United States v. Polk, 550 F.2d 566, 567 (9th Cir. 1977)

GOVERNMENT PROPOSED JURY INST. NO. 232Withholding Taxes

This case involves federal withholding taxes. Under the law, an employer is required to withhold certain amounts from the wages paid to its employees. The amounts withheld are for federal income taxes and for F.I.C.A. taxes, which are also known as social security taxes. When the employees file their personal income tax returns, they compute what they owe and credit against this the amount of income tax withheld by their employer from their wages during the year. I am sure you are all aware of the standard W-2 form prepared by employers showing how much was withheld from wages during the year, which is then attached by the employee to his or her personal income tax return.

When an employer pays wages to an employee, the employer must set aside the amounts to be withheld in a trust fund for the government since these amounts are to be credited, in whole or in part, to the income tax and social security accounts of the employee. By trust fund, it is meant that such withheld amounts do not belong to the employer but are merely held by the employer for the benefit of the government until paid over to the government and then credited to the accounts of the employees for income tax and social security purposes.

D'Orazi v. United States, 71-1 U.S.T.C., para. 9270, pp. 86,046-86,048; 27 A.F.T.R.2d 865, 866-868 (N.D. Cal. Nov. 5, 1970)

Neale, Sr. v. United States, 13 A.F.T.R.2d 1721, 1722 (Kan. April 29, 1964)
26 U.S.C. §§ 3101, 3102, 3401, 3402, 3403 6302(c), & 7501

GOVERNMENT PROPOSED JURY INST. NO. 233Person Required to Collect, Account For, and Pay Over Tax

In order to be found guilty of the offenses charged in the information [*indictment*], the defendant must have been a person required to collect, account for, and pay over withheld federal income and F.I.C.A. taxes. An individual is such a person if he [she] is connected or associated with a corporate employer in such a manner that he [she] has the ultimate authority over the corporation, or the power to assure that the withholding taxes are paid, or the power to determine which bills will be paid and when, or significant control over the financial decision-making process within the corporation. Such a person may be either an officer, employee, member of the board of directors, or shareholder of the corporation. He [she] may be a person required to collect, account for, and pay over withheld taxes whether or not he [she] does the actual mechanical work of keeping records, preparing returns, or writing checks.

26 U.S.C. § 7343

United States v. McMullen, 516 F.2d 917, 920-921 (7th Cir.), *cert. denied*, 423 U.S. 915 (1975)

Pacific National Insurance v. United States, 422 F.2d 26 (9th Cir.), *cert. denied*, 398 U.S. 937 (1970)

United States v. Graham, 309 F.2d 210 (9th Cir. 1962)

D'Orazi v. United States, 71-1 U.S.T.C., para. 9270, p. 86,048; 27 A.F.T.R.2d 865, 868-869 (N.D. Cal. Nov. 5, 1970)

GOVERNMENT PROPOSED JURY INST. NO. 234

Defendant Cannot Delegate Responsibility

If the defendant was a person required to collect, account for, and pay over withholding taxes at the time the notice directing him [her] to make deposits of the taxes to a special bank account in trust for the United States was served upon him [her], then he [she] was under a duty to make such deposits and could not relieve himself [herself] of that duty by attempting to delegate it to another corporate officer or employee.

Mazo v. United States, 591 F.2d 1151, 1155 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979)

United States v. Leuschner, 336 F.2d 246, 248 (9th Cir. 1964)

Levy v. Tomlinson, 249 F. Supp. 659, 661 (S.D. Fla. 1965)

Jackson v. United States, 19 A.F.T.R.2d 1579, 1582 (S.D. Ind. Feb. 16, 1965)

D'Orazi v. United States, 71-1 U.S.T.C., para. 9270, p. 86,048; 27 A.F.T.R.2d 865, 869 (N.D. Cal. Nov. 5, 1970)

GOVERNMENT PROPOSED JURY INST. NO. 235

More Than One Responsible Person

There may be more than one person connected with a corporation who is required to collect, account for, and pay over withholding taxes, but the existence of this same duty and responsibility in another individual would not necessarily relieve the defendant of his [her] responsibility.

Monday v. United States, 421 F.2d 1210, 1214 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970)

White v. United States, 372 F.2d 513, 516-520 (Ct. Cl. 1967)

D'Orazi v. United States, 71-1 U.S.T.C., para. 9270, p. 86,047; 27 A.F.T.R.2d 865, 868 (N.D. Cal. Nov. 5, 1970)

GOVERNMENT PROPOSED JURY INST. NO. 236

Proof of Exact Amounts Not Required

The government need not prove, as to each count of the information, a failure to deposit the exact amount of taxes alleged in that count. It is sufficient for the government to prove beyond a reasonable doubt as to each count of the information [*indictment*] that there was a failure to deposit any amount of taxes collected and withheld from employee's wages which should have been deposited in a separate bank account in trust for the United States by the defendant.

United States v. Gay, 576 F.2d 1134, 1138 (5th Cir. 1978)

GOVERNMENT PROPOSED JURY INST. NO. 237Exception -- Circumstances Beyond Control

The law provides an exception to the statute where the defendant can show that the failure to collect, deposit, and keep the taxes in the separate bank account was due to circumstances beyond his [her] control. For this purpose, however, a lack of funds existing immediately after the payment of wages, whether or not resulting from the payment of the wages, is not to be considered circumstances beyond a person's control. This can be illustrated by an employer who has gross payroll requirements of \$1,000, with respect to which he [she] is required to withhold \$100 of income taxes. If such an employer had on hand only \$900 and paid out this entire amount in wages, withholding and depositing nothing, the fact that the net wages due equaled this amount would not constitute circumstances beyond a person's control.

A lack of funds occurring after the payment of wages, so long as it was not immediately after, would, however, qualify under this exception if it were due to circumstances beyond the person's control. Examples of factors which might result in a lack of funds constituting circumstances beyond the control of the person after, but not immediately after, the payment of wages and within the period before the time the person was required to deposit the funds are theft, embezzlement, destruction of the business from fire, flood, or other casualty, or the failure of a bank in which the person had deposited the funds prior to transferring them to the trust account for the government. However, a lack of funds immediately after the payment of wages resulting, for example, from the payment of creditors would not be considered circumstances beyond the person's control.

This does not, however, impose upon the defendant the burden of producing proof of a circumstance beyond his [her] control, or any other evidence. The burden is always upon the government to prove guilt beyond a reasonable doubt.

United States v. Randolph, 588 F.2d 931, 932-933 (5th Cir. 1979)

United States v. Plotkin, 239 F. Supp. 129, 131-132 (E.D. Wis. 1965)

S. Rep. No. 1182, 85th Cong., 2d Sess. ((1958) 2 U.S. Code Cong. & Ad. News 2187, 2191-2192)